The imposition of a tax upon incomes derived from property situated or from business carried on within the state seems hardly open to question. Whether we regard the tax as an excise duty, or as a property tax, it is equally true that the state which protects the property and business and permits the owner to enjoy it is entitled to tax the income arising from it. In a recent case, *Shaffer* v. *Howard*,[7] a tax was levied in Oklahoma upon the income from an oil well there situated, and operated under lease by a resident of Illinois. The proceeds of the sale of oil were actually received by the owner in Illinois. The majority of the court (Stone, Circuit Judge, and Cotteral, District Judge) held that the last fact made no difference, and that the tax was valid. Campbell, District Judge, dissented, upon the ground that in taxing the income of all residents, from whatever source, as the act did, the state was creating a tax based upon personal jurisdiction, and it was not permissible in the same act to impose a tax upon income derived by a nonresident from property in the state, which must be supported upon the ground of jurisdiction over the property. The ground of dissent seems unsound; if a tax is valid on any ground, it cannot be invalidated by classifying it as a particular kind of tax, and then alleging its invalidity because it is so classified.[8] The decision of the majority, affirming the power of the state to tax income derived from property within its territory, no matter where the income may chance to be received by the owner, seems unassailable.

WHAT CONSTITUTES A PUBLIC USE. — From the time of Magna Charta, the property of A could not be taken and given to B. A's property could only be taken for a public purpose, and then only after compensation. But when A in the use of his property had "affected it with a public interest, it ceased to be *juris privati* only,"[1] and it was because in the voluntary use of his property he had so affected it with a public interest that his use of it was subjected to public control. This was the common law whence come the rights our Constitution protects. Legislation cannot change it,[2] property cannot become affected with a public interest by mere legislative fiat. It is the voluntary use of one's property in such a manner as to make it of public consequence that gives the public the right to control its use.[3]

Looking again at the common law, certain businesses and professions were as early as the thirteenth century subject to regulation.[4] From the nature of things practically every business and every profession was

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[7] 250 Fed. 873 (Okla.) (1918).

[8] Holmes, J., in New York Central R. R. Co. *v.* Miller, 202 U. S. 584, 596 (1906).

[1] 1 HARG. LAW TRACTS, 78.

[2] State *ex rel.* M. O. Danciger & Co. *v.* The Public Service Commission, 205 S. W. 36 (Mo.) (1918); Associated Pipe Line Co. *v.* The Railroad Commission, 169 Pac. 62 (Cal.) (1917); Munn *v.* Illinois, 94 U. S. 113 (1876). See Producers' Transportation Co. *v.* The Railroad Commission, 169 Pac. 59, 61 (Cal.) (1917): "It is not the *ipse dixit* of the law, but the fact that the petitioner has voluntarily devoted its property to a public use, which justifies the control assumed by the Railroad Commission."

[3] Producers' Transportation Co. *v.* The Railroad Commission, *supra;* 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 200.

[4] 1 WYMAN, §§ 1–15; 17 HARV. L. REV. 156.

monopolistic;[5] competition was not the normal situation. With the rise of industrialism coincident with the settlement of America and culminating in the first half of the nineteenth century, competition became the normal situation, effectually regulating businesses, governmental control disappearing in practically all cases[6] except that of the innkeeper[7] and the carrier.[8] It would therefore seem that the failure of competition, actual or potential, to safeguard the public interests was the common-law test of a public calling subjecting it to public control.

In determining what constitutes a public use legislation, as has been shown, cannot be depended upon.[9] The presence or absence of exclusive or other legal privileges, eminent domain, use of highways, or governmental financial aid, though helpful, are not conclusive;[10] for if given for other than public purposes the grant is void.[11] Precedents are of little avail, for what is a public use to-day may not be to-morrow.[12] That it is one's main undertaking or only incidental thereto is no criterion.[13] The number of consumers to whom the service is rendered is immaterial, there may be one or there may be many.[14] We must revert to the common-law standard, which is invariable, though the results attained may differ owing to modern developments and change of circumstances.[15] In applying the common-law standard to determine whether in any particular undertaking competition or substantial monopoly is the normal situation, two elements must be considered — that of monopoly and great public interest.[16] Limitations of source of supply,[17] limitations of time,[18] scarcity of sites,[19] and area of distribution[20] give one a natural monopoly; the enormous investments sunk in one place,[21]

[5] 17 HARV. L. REV. 158. But see 28 HARV. L. REV. 135, 141.

[6] 1 WYMAN, § 27.

[7] Thompson *v.* Lacy, 3 B. & Ald. 283, 286 (1820).

[8] Bretherton *v.* Wood, 3 Brod. & Bing. 54, 62 (1821). See 11 HARV. L. REV. 158.

[9] See note 2, *supra.*

[10] Terminal Taxicab Co. *v.* Kutz, 241 U. S. 252, 36 Sup. Ct. Rep. 583 (1916); State *ex rel.* Wood *v.* Consumers Gas Co., 157 Ind. 345, 61 N. E. 674 (1901); Munn *v.* Illinois, *supra;* Polk *v.* Coffin, 9 Cal. 56 (1858). See State *ex rel.* M. O. Danciger & Co. *v.* Public Service Commission, *supra.*

[11] 17 HARV. L. REV. 217 and 222.

[12] The doctor, Y. B. 19 HEN. VI, 49, pl. 5 (1441), or the smith, Anon., Keilway, 50, pl. 4 (1450), could not at present be called public utilities. Hurley *v.* Eddingfield, 156 Ind. 416, 59 N. E. 1058 (1901).

[13] Hahl *v.* Laux, 93 S. W. 1080, 42 Tex. Civ. App. 182 (1906); Gordon *v.* Hutchinson, 1 W. & S. 285 (1841).

[14] Bridal Veil Lumbering Co. *v.* Johnson, 30 Ore. 205, 46 Pac. 790 (1896).

[15] It is no longer required that the innkeeper provide for the traveler's horse.

[16] 17 HARV. L. REV. 221.

[17] Natural-gas fields or the supply of water are limited by nature.

[18] The limitation of time is the big factor in subjecting the innkeeper to public control. The immediate needs of the traveler prevent choice and bargain.

[19] Favorable locations are big factors in business, and their scarcity prevents effective competition in that locality. Barrington *v.* The Commercial Dock Co., 15 Wash. 170, 45 Pac. 748 (1896); Munn *v.* Illinois, *supra;* People *v.* Budd, 117 N. Y. 1, 22 N. E. 670, 682 (1889).

[20] Gas and electricity are distributed by means of pipes and wires laid in the public highways, for which permission from the local authorities must be had. This makes competition with the established company improbable if not impossible, while candles or coal can be shipped from any factory or mine to any market, thus preserving competition.

[21] The enormous sums required to build an electric plant or railroad is a deterrent to others to duplicate such in light of the risk so incurred.

the cheapness and efficiency of large scale production, the lack of an adequate substitute [22] create a virtual monopoly,[23] and where any or all of these monopolistic elements are present to a substantial degree, competition as a practical matter is superseded by the normal situation of substantial monopoly. Couple to these elements of monopoly the great public interest in the business undertaken, and the need of governmental control to prevent the exploitation of the public for private gain is apparent. "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[24]

The decisions of Public Service Commissions as to what constitutes a public use in those businesses admitting of both a public or private calling have been almost unanimously *contra* to the decisions of the courts.[25] The decisions of the commissions show a belief that the declarations of the legislature,[26] the number of consumers,[27] or the mere profession of a public use [28] are conclusive, without inquiring whether such use has in fact become affected with a public interest. Thus where the respondent was held to be a public utility on the grounds that he was conducting a business declared by statute to be subject to the jurisdiction of the commission,[29] the court, in the recent case of *State ex rel. M. O. Danciger & Co.* v. *The Public Service Commission*,[30] after setting forth the statute defining an electric plant, said: "While the definitions quoted *supra* express therein no word of public use, or necessity that the sale of electricity be to the public, it is apparent that the words 'for public use' are to be understood and to be read therein." The court proceeded to show that the respondent had not in the use of its property affected it with a public interest, that the undertaking was not therefore a public utility, and so overruled the decision of the commission.

That there should be a conflict between the decisions of the Public Service Commissions and the courts is undesirable. The decisions of the commissions may be due to the radical tendencies present in all new fields, or they may be due to the fact that temporary jurisdiction is at

[22] He who burns candles is obviously at a greater disadvantage than his neighbor who is supplied with gas from the local company.

[23] 17 HARV. L. REV. 227. See People *v.* Budd, *supra*, where the court speaks of "practical" monopoly.

[24] Munn *v.* Illinois, *supra*.

[25] State *ex rel.* Public Service Commission *v.* Spokane & Inland Empire Ry. Co., 89 Wash. 599, 154 Pac. 1110 (1916); Del Mar Water, Light & Power Co. *v.* Eshleman, 167 Cal. 666, 140 Pac. 591, 948 (1914); Cawker *v.* Meyer, 147 Wis. 320, 133 N. W. 157 (1911); State Public Utilities Commission *ex rel.* Evansville Telephone Co. *v.* Okaw Valley Telephone Co., 282 Ill. 336, 118 N. E. 760 (1918); De Pauw University *v.* Public Service Commission, 247 Fed. (Ore.) 183 (1917); Brown *v.* Gerald, 100 Me. 351, 61 Atl. 785 (1905); Minnesota Canal & Power Co. *v.* Koochiching Co., 97 Minn. 429, 107 N. W. 405 (1906); Associated Pipe Line Co. *v.* Railroad Commission, *supra*.

[26] Associated Pipe Line Co. *v.* Railroad Commission, *supra;* Cawker *v.* Meyer, *supra*. In the latter case it was contended by the Public Service Commission that anyone supplying light, heat, or power to another for compensation was by statute subject to the jurisdiction of the commission. See Munn *v.* Illinois, *supra:* "It may not be made so by the Constitution of Illinois or this statute, but it is by the facts."

[27] That the number of consumers is immaterial, see note 14, *supra*.

[28] 1 WYMAN, § 200.

[29] Vol. 4, Mo. P. S. C. R. 650.

[30] 205 S. W. 36 (Mo.) (1918).

least lost to the commission should a use be declared private, while if held public the aggrieved party has an appeal to the courts.[31] But it is submitted that the real difficulty is the failure on the part of the commissions to comprehend the basic principles underlying governmental control of businesses and the failure to appreciate and respect constitutional limitations.

RECENT CASES

AGENCY — SCOPE OF EMPLOYMENT — TEST. — It was the duty of the defendant's automobile driver to take a certain infirm employee of the defendant home each evening from work. One evening on arriving home this employee directed the driver to take his wife's dressmaker to her home which was in the direction of but far beyond the garage. On this mission, and before reaching the garage, and on the route that the driver would have taken in the course of his employment in driving the car to the garage, the car ran into and injured the plaintiff who was using due care. *Held*, the defendant is not liable. *Clawson* v. *Pierce Arrow Motor Car Co.*, 170 N. Y. Supp. 310 (App. Div.).

The principal case raises the question of whether the servant was within the scope of his employment when the injury occurred in doing, from the objective point of view, the very act authorized, and when the servant was innocent of any determination to disobey the master. The exact facts of the principal case are novel, but in a similar case the subjective test was held decisive. *Thompson* v. *Aultman and Taylor*, 96 Kans. 259, 150 Pac. 587. This view accords with the principles enunciated by leading cases which consider the test to be whether the servant was merely deviating or on an independent journey. *Joel* v. *Morison*, 6 C. & P. 501; *Mitchell* v. *Crassweller*, 13 C. B. 237. This in effect makes the test whether what the servant was doing was merely a poor or roundabout way of doing the master's work or no way at all. See *Limpus* v. *London General Omnibus Co.*, 1 H. & C. 526, 542–43. To determine this, modern cases have considered along with the objective test the intent of the servant. *Fleischer* v. *Durgen*, 207 Mass. 435, 93 N. E. 801; *Provo* v. *Conrad*, 130 Minn. 412, 153 N. W. 753; *Colewell* v. *Aetna Bottle & Stopper Co.*, 33 R. I. 531, 82 Atl. 388; *Healey* v. *Cockrill*, 202 S. W. 229 (Ark.); *Dockweiter* v. *American Piano Co.*, 94 Misc. Rep. 712, 160 N. Y. Supp. 270; *Jones* v. *Strickland*, 77 So. 562 (Ala.); *Trombley* v. *Stevens-Duryea Co.*, 206 Mass. 516, 92 N. E. 764; *Nelson Business College Co.* v. *Lloyd*, 60 Ohio St. 448, 54 N. E. 471; *Davies* v. *Anglo-American Tire Co.*, 145 N. Y. Supp. 341. The principal case is interesting in that it decides that the whole journey from the time of taking the dressmaker in the car is independent and not a roundabout way of performing the master's work, although objectively there had been at the time of the accident not even a deviation.

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN STATUTES — PENAL NATURE OF DEATH STATUTE. — For injuries resulting in death a Massachusetts statute gave damages of $500 to $10,000, depending upon "the degree of culpability" of the person causing the same. (R. L. c. 171, § 2, as amended by L. 1907, c. 375). The administrator of the deceased sues in New York under this statute. *Held*, he can recover. *Loucks* v. *Standard Oil Co. of N. Y.*, 120 N. W. 198 (N. Y.).

Suits for torts committed in one state may be brought in another unless public policy forbids. See 31 HARV. L. REV. 1161. But penal statutes will not be so enforced. *The Antelope*, 10 Wheat. (U. S.) 66, 123. In the principal

[31] See Salt Lake City *v.* Utah Light & Traction Co., 173 Pac. 556 (Utah) (1918).